Supreme Court, U.S.
FILED
931372 FEB 22 1994
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SYLVIA EVANS, et al., Petitioners,

v.

CITY OF CHICAGO, Respondent.

BERTHA BALARK, et al., Petitioners,

v.

CITY OF CHICAGO, Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER EVANS' PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) IF THE SEVENTH CIRCUIT DECISION COMPLETELY REJECTS THE CONTRACTUAL BASIS OF CONSENT DECREES INVOLVING GOVERNMENTAL ENTITIES, IS THIS CONSISTENT WITH SUPREME COURT STANDARDS FOR MODIFYING CONSENT DECREES.

(2) IS PLEADING AND PROOF OF HARDSHIP NECESSARY BY A PARTY SEEKING MODIFICATION OF A CONSENT DECREE EVEN AFTER INITIAL PROOF OF A CHANGE IN THE RELEVANT LAW.

(3) DOES THE SEVENTH CIRCUIT DECISION EFFECTIVELY ELIMINATE STATE LAW PENDENT JURISDICTION CLAIMS FROM THE PROTECTION OF FEDERAL CONSENT DECREES.

(4) DOES THE SEVENTH CIRCUIT DECISION IN FAILING TO REQUIRE TAILORING OF PROPOSED MODIFICATION OF A CONSENT DECREE TO A CHANGE IN THE RELEVANT LAW MEET STANDARDS FOR MODIFYING CONSENT DECREES.

(5) DOES THE SEVENTH CIRCUIT DECISION VIOLATE THE STANDARD THAT MODIFICATION OF CONSENT DECREES NEED NOT CONFORM TO A FEDERAL CONSTITUTIONAL FLOOR.

(6) WHERE THE STANDARD FOR APPELLATE REVIEW IS FOR ABUSE OF DISCRETION, MAY THE REVIEWING COURT MAKE ITS OWN FINDINGS OF FACT DE NOVO.

PARTIES TO THE PROCEEDINGS

Petitioner, SYLVIA EVANS, was a Plaintiff before the United States District Court for the Northern District of Illinois and was appointed as representative of a class which was certified by the Court.

In the United States Court of Appeals for the Seventh Circuit, SYLVIA EVANS was an appellee.

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Sylvia Evans ("Evans") respectfully petitions for issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

There are three separate opinions in *Evans v. City of Chicago*. They are reported at 689 F.2d 1286 (7th Cir. 1982) (App. 108); 873 F.2d 1007 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 2650 (1990) (App. 72); and 995 F.2d 1393 (7th Cir. 1993) (App. 1). The opinions in the trial court on October 22, 1987 and on July 25, 1991, are not reported in Federal Supplement, and appear at App. 143 and at App. 52.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on November 24, 1993, after rehearing en banc. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND RULES

1. Section 1983 of the Federal Civil Rights Act, 42 U.S.C. § 1983 (see Addendum).

2. Rule 60 of the Federal Rules of Civil Procedure (see Addendum).

STATEMENT OF THE CASE

There are three Seventh Circuit opinions in this litigation. For convenience sake, these are referred to as *Evans I* (1982); *Evans II* (1989) and *Evans III* (1993). Copies of the opinions are reproduced in the Appendix to the Petition.

In *Evans I*, the Plaintiff classes attacked CHICAGO's methods of paying judgment creditors in tort cases. Every settlement in a tort case against CHICAGO is reduced to a judgment, just as is any final tort judgment against CHICAGO which is not subject to further appeal. CHICAGO paid tort judgments of $1,000.00 or less as soon as the judgment holders presented proper documents. All judgments over $1,000.00 were recorded in the CHICAGO Comptroller's "Judgment Record" and then paid in chronological order, by date of entry of each judgment. Since CHICAGO deliberately did not appropriate sufficient monies each year to pay the outstanding judgments, the waiting period for tort judgment creditors reached 47 months in 1979. As a result, most of the over-$1000 judgment holders sold their judgments at discounts which reached 20 percent. The *Evans I* opinion describes the plaintiff classes and sums up CHICAGO's practices in paying tort judgments. (App. 111-112)

The *Evans I* plaintiff classes asserted federal due process and equal protection claims, and also claims under the Illinois Constitution and Illinois statutes. Section 9-104(a) of Chapter 85 of the Illinois Revised Statutes was challenged on the basis of procedural due process, but the trial court did not reach this issue. The trial court did hold that Section 9-104(b) of the Illinois statute violated federal due process. On this point, the Seventh Circuit held that plaintiffs had no standing to attack this part of the statute because CHICAGO had never invoked the installment payment plan provided for therein. The trial court had also ruled that the practice of CHICAGO in prioritizing payment of the under-$1000 tort judgments in preference to the over-$1000 judgments was a violation of federal equal protection. The Seventh Circuit affirmed this ruling, one Justice dissenting on the basis that both provisions of the Illinois statute were squarely before the court and that he would find both unconstitutional.

The majority expressed no opinion about the constitutionality of Section 9-104.

The parties thereafter entered into a consent decree on May 31, 1984. The decree described what was being compromised:

> PURPOSES OF CONSENT DECREE
>
> 1. The parties state that they are entering into this Consent Decree for the purpose of avoiding the further expense of protracted litigation over the matters resolved and decided by this Consent Decree. The parties intend this Consent Decree to fully and finally resolve the budgetary and equitable aspects of plaintiffs' class complaint, reserving only plaintiffs' claims or damages and claims for attorneys' fees. All equitable and legal rights of the plaintiffs are merged into this Consent Decree unless otherwise specified * * *.
>
> 4. The parties hereto expressly reserve their respective rights to fully assert and defend against any claim or claims to damages and attorney's fees arising out of the policies or practices alleged to have violated Plaintiffs' rights in this matter. (App. 99-100)
>
> TERMS OF SETTLEMENT
>
> 3. Plaintiff's understand, upon advice of counsel, and agree that except as otherwise provided herein, this Decree is a final and total settlement of all claims they now have or may have in the future, arising either directly or indirectly out of or related to Ill. Rev. Stat. 1981, ch. 85 §9-104 and Ill. Rev. Stat. 1981, ch. 24 §8-1-16, as well as under the United States and Illinois Constitutions, except for claims for damages and attorneys fees, as hereinafter specified; and that such finality is applicable to the defendants, the City of Chicago, and its officers, agents and employees. (App. 101)

CHICAGO retained full rights to contest damages. The parties waived trial by jury. A formula was spelled out for making future appropriations for tort judgment pay-

ments in order to ensure there would be adequate funds available for payment. (App. 103-106) Specifications were laid down for processing judgments for payment. (App. 102) CHICAGO was required to submit detailed reports for years 1984 through 1987. (App. 106) Jurisdiction was retained by the court to enforce or modify provisions of the decree, including reporting. (App. 107)

A bench trial was held in 1989. The parties had entered into a Stipulation for purposes of the trial. According to the Stipulation, the trial court was to decide only two questions relative to damages, although CHICAGO continued to insist that there should be no damages. The first question was whether there should be any damages awarded at all. The court decided this question "Yes." The second question was from what beginning date damages should be calculated for each judgment in the relevant time period. The court then chose one of the two alternative starting points agreed in the Stipulation. The damages then were to be automatically calculated from an agreed computerized program of all applicable judgments. Accordingly, there was no entry of judgment in any specific dollar amount.

The trial court's ruling and remarks after the trial on damages centered on the "customary and routine practices" of CHICAGO as follows:

> * * * First, the City did not pay such judgments within the year the judgment was entered. Secondly, the City did not pay such judgments in the ensuing year. Thirdly, the City did not pay those judgments in 10 annual installments. Fourthly, the City did not pay such judgments in accordance with any state statute. Fifth, the City did not pay those judgments in accordance with its own ordinance, Ordinance 7-29, which required that they be paid in order of entry. And sixth, the City made no attempt to budget enough money to pay judgments over $1,000 in accordance with the time limits established by statute or its own ordinance.

> In short, with respect to judgments over $1,000, it was the custom and practice of the City simply to ignore the requirements of law with regard to when those judgments should have been paid. (App. 148-149)
>
> * * * * *
>
> * * * It seems to me that the practices of the City may well be or have been, because we are speaking in the past tense here, a violation of both procedural and substantive due process. The argument for a violation of procedural due process is that the City followed no process at all. There simply was no procedure other than a consistent and intentional disregard of the procedure that was clearly established by law. * * *
>
> It seems to me, therefore, that the practice of the City probably violated the due process rights of the plaintiffs. I emphasize that I am talking about the practice of the City because I need not reach even by way of discussion the question of whether the procedure specified in Section 9-104(a) comports with due process. The reason I need not reach that question is that the City never made any effort whatsoever to comply with that statute. It simply isn't involved in this case. * * * (App. 149-150)

The trial court further stated more emphatically that it did not reach the issues of procedural and substantive due process on the basis that the equal protection holding in *Evans I* is the "law of the case." (App. 150-156)

CHICAGO appealed from the award of damages. In *Evans II* (App. 72) the Seventh Circuit ruled that the actions of plaintiff's counsel at trial had reopened the equal protection issue; that the holding in *Evans I* that there was a federal equal protection violation was plain error; and that the plaintiff's failure to cross-appeal on the trial court's declination to expressly rule on the procedural and substantive due process issues meant that those issues were no longer part of the case. In this latter respect,

the Seventh Circuit in *Evans II* at footnote 11 said that the due process issue ". . . was not argued by the parties on this appeal (App. 80-81) and at footnote 15 stated: "The due process claim has not survived to this stage of the litigation." (App. 92) Plaintiffs had not appealed from the refusal of the trial court to reach the due process issues.

Thereafter, CHICAGO filed a petition to vacate the consent decree in its entirety. The petition was brought pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, that a "prior judgment upon which it is based has been reversed or otherwise vacated, where it is no longer equitable that the judgment should have prospective application . . ." CHICAGO argued that it came within both provisions of Rule 60(b)(5): the prior judgment upon which the Consent Decree is based has been overruled, and, secondly, because the prior judgment was overruled, it is no longer equitable that the consent judgment should have prospective application (App. 57). At no time did CHICAGO make any claim that adherence to the consent decree would cause severe unanticipated hardship.

In its oral ruling the trial court stated that the CITY's claim was that the trial court ". . . should be guided exclusively by the decisions in *Evans I*, *Evans II*, and the language of the consent decree itself. After considerable reflection, I have come to agree with that point of view." (App. 62) The trial court then quoted extensively from *United States v. Armour & Company*, 402 U.S. 673 (1971) and then stated:

> I find that language instructive in two respects. First, it admonishes us to construe the Decree within its four corners and not attempt to discern the probably opposing purposes of the parties when they entered into it. The second lesson we learn from the *Armour* case is that a party who has entered into a Consent

> Decree should be held to its bargain and should not be permitted to vary the Consent Decree or escape from its obligations while using some theory it chose not to litigate and chose, rather, to compromise.

The trial court further held that *EVANS II* did not reverse, vacate or overrule the due process claims which were otherwise settled in the consent decree, so that CHICAGO could not rely on this aspect of Rule 60(b)(5) to vacate the decree. Although CHICAGO claimed that *EVANS II* rejected the rational basis test which would underlie a due process inquiry, the court said:

> The City argues that Evans II can be read as rejecting the rational basis test that would be the underpinning of a due process claim just as much as it rejected that same test or, rather, found that the City's practices did not violate that test under the equal protection claim. It is true that in my decision in the damages trial, I observed that the rational basis test appeared to be relevant to both an equal protection and a due process analysis. And it may be that in light of Evans II the Seventh Circuit, if confronted with the due process questions today, would say that no violation of due process is involved because there is a rational basis for the City's practices of paying, for instance, contract judgments ahead of tort judgments, or personnel judgments ahead of judgments payable out of the tort judgment fund, and a rational basis for the failure to budget enough money to pay tort judgments within a reasonable time.
>
> The point is, I believe, that holding has not yet been made. (App. 61)

The trial court treated other equitable considerations as a separate avenue of relief under Rule 60 and held there were none adequate to justify vacation of the decree. (App. 61-65)

Thereafter, CHICAGO appealed. The panel decision was 2 to 1 in favor of plaintiffs. (App. 24) CHICAGO petitioned

for rehearing en banc, which was granted, and the decision after rehearing was 6 to 5 in favor of CHICAGO, (App. 1) from which plaintiffs appeal and seek certiorari.

REASONS FOR GRANTING THE PETITION

Statement Regarding Jurisdiction in the Lower Federal Courts

Plaintiff *Evans* contends that jurisdiction in the trial court was based on federal question jurisdiction, 28 U.S.C. §§ 1331 and 1343 (1988) involving a question under the Federal Civil Rights Act, 28 U.S.C. § 1983 (1988), and also was based on pendent jurisdiction with respect to claims asserted under the Illinois Constitution and statutes, pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). In the United States Court of Appeals for the Seventh Circuit, jurisdiction was based on 28 U.S.C. §§ 1291 and 1292(a)(1) (1988).

I.

THIS COURT'S OPINION IN THE *RUFO* CASE IS MISINTERPRETED BY THE LOWER FEDERAL COURTS AND PARTICULARLY BY THE SEVENTH CIRCUIT AS A GREEN LIGHT TO VACATE CONSENT DECREES.

Evans III grossly misapplied the standards to be followed where one party to a federal consent decree seeks to vacate the decree.

This court's opinion in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. ____, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) has triggered a minor avalanche of petitions in the lower federal courts seeking to vacate consent decrees. What makes *Evans III* important is the correct statement by the dissent that the plurality opinion has

". . . put in grave doubt" the value of consent decree settlements with governmental entities. The dissent went further and stated that the decision ". . . effectively deprives state and local governments of the ability to enter into enforceable consent decrees." (App. 19) The plurality opinion propounds the radical legal doctrine that governmental entities are not able to enter into binding consent decrees: (App. 7-8)

> * * * . . . democracy does not permit public officials to bind the polity forever. What one City Council enacts, another may repeal; what one mayor decrees during his four-year term, another may revoke. * * * The current mayor wants to be free of his predecessor's commitment, concluding that more flexibility over budgets will promote the public welfare. People of good will could be on either side of this disagreement; each mayor may have correctly perceived the needs of the moment.

If this view is allowed to prevail, legal chaos will result. There is simply no question whatsoever but that counsel for opponents of state and local governments will shun consent decrees which, based on *Evans III*, are subject to the possibility of being reopened at the option of a settling defendant. If *Evans III* remains the law, settlement resolution of federal claims against all kinds of government entities will become an endangered species. At a minimum, the increasingly inexact interpretations of *Rufo* in the lower federal court are a positive invitation to any defendant already party to a consent decree to promptly begin the process seeking to elude it. Consequently, it is not unreasonable to expect that a clear majority of consent decree settlement defendants will be encouraged enough by the development of post-*Rufo* law to petition the federal courts for relief.

The *Evans* plaintiffs claim that *Evans III* is such a serious misapplication of the rule announced in *Rufo* that

this court must grant review in order to maintain proper supervision over the lower federal courts in vacating or modifying consent decrees.

Without question federal appeals courts are interpreting *Rufo* as permitting a wide and sweeping latitude for re-examining consent decrees for modification or vacation purposes. As examples: *In the Matter of Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993) ("So now a court can modify an injunction whenever the principles of equity require it to do so."); *United States v. City of Miami*, 2 F.3d 1497, 1504-1505 (11th Cir. 1993) (termination of employment discrimination decree appropriated solely based on changed circumstances in achievement of purpose of decree); *United States v. City of Chicago*, 978 F.2d 325, 333 (7th Cir. 1992) (proof that a decree "functioned more like a judgment than a contract" permits modification); *Brotherhood of Midwest Guardians, Inc. v. City of Omaha*, 1993 WL 432769 (8th Cir. 1993) (affirmative action consent decrees are "not favored" unless they will terminate when manifest racial imbalances are eliminated); *Hesselbein v. Clinton*, 999 F.2d 320, 324-325 (8th Cir. 1993) (lack of clarity in enforcement provisions of decree allows the trial court to vacate the entire decree if necessary on remand). Recently a district court was presented with a modification request on the basis of bare conclusionary statements in an affidavit by a former prison administrator that ". . . the Division of Prisons had made a number of assumptions regarding the custody level and population requirements of the system . . ." and ". . . did not foresee the crisis we face today." *Small v. Hunt*, 1994 WL 9445 (E.D.N.C. 1994)

There is a growing body of law review comment espousing the view that *Rufo* is an undesirable development in the law of consent decrees. In Comment, *The Supreme Court, 1991 Term; Leading Cases*, 106 HARV.L.REV. 163,

293 (1992) the author states: "By making the gains won in consent decrees extremely susceptible to erosion, the *Rufo* standard makes consent decrees less attractive." In Comment, *"Consent Decrees in Prison and Jail Reform—Relaxed Standard of Review for Government Motions to Modify Consent Decrees"*, 83 NORTHWESTERN L. SCHL. JRNL. OF CRIM. LAW & CRIMINOLOGY 1024, 1044 (1992) it is stated:

> While the flexible standard put forward in *Rufo* can be harmonized with the language in *Swift*, on its face the *Rufo* standard seems incompatible with the contractual "four corners" rule put forth by the Court in *United States v. Armour & Co.* and *Firefighters Local Union No. 1784 v. Stotts.*

Another similar viewpoint is found in Comment, *"Settling Through Consent Decree In Prison Reform Litigation: Exploring the Effects of Rufo v. Inmates of Suffolk County Jail"*, 34 BOSTON COLL.L.REV. 163, 196 (1992):

> "After *Rufo*, parties contemplating consent decrees as a means of settlement must proceed carefully, because the *Rufo* standard offers no guarantee that even their most basic expectations will be protected."

In a concurring opinion in *Rufo*, Justice O'Connor expressed concern whether the standard for modification elaborated in the opinion ". . . makes matters any clearer than the equally general language of Rule 60(b)(5)." (112 S.Ct. at 765). Two years later, the best tentative answer is that the standards in *Rufo* are set forth in a straightforward, explicit summary but the lower federal courts, as in *Evans III*, frequently are not following those standards in a manner that is congruent with what is stated in *Rufo*. *Evans III* is a prime example.

II.

THE PLURALITY IN *EVANS III* COMPLETELY REJECTS THE CONTRACT BASIS OF CONSENT DECREES.

Judge Easterbrook, the author of the plurality opinion in *Evans III* first sketched the outline of his developing theory in 1987 and acknowledged it was a minority view: "Ultimately, there is no good reason to allow consent decrees to exceed the authority the parties would have in the absence of litigation. This is a minority view so far." Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U.CHI.L. FORUM 19, 39 (1987) The author convinced the *Evans III* plurality to adopt the rather radical doctrine that governmental entities cannot be held to their consent decree bargains on a contractual theory. He states (App. 8):

> Governments are in this respect unlike corporations or other contracting parties. * * * But temporary officeholders may not contract away the basic powers of government to enact laws—or in this case to adopt budgets—in the same way natural persons may make enduring promises about their own future behavior. * * *
>
> Consent alone is insufficient to support a commitment by a public official that ties the hands of his successor. * * *

To the extent that contractual rules apply in construing consent decrees, it is important to note that the *Evans* consent decree resulted from bargaining which must have included each party's estimate of what potential rights existed under state law. Consideration is the bedrock of every contract. The *Evans* plaintiffs' giveup was part of the legal consideration they parted with in return for obtaining the benefit of the injunction.

Before *Rufo* the contractual aspects of consent decrees received great emphasis in the Seventh Circuit. An easy

example of this is found in *United States v. City of Northlake*, 942 F.2d 1164 (7th Cir. 1991). In refusing to hold that hiring practices by the CITY fell outside the scope of a racial discrimination consent decree, the Court stated:

> First the enforcing court will look to the plain language of the written agreement as the best expression of the parties' intent. If, as this Court as noted before, "the language of the contract unambiguously provides an answer to the question at hand, the inquiry is over" *Lumpkin v. Envirodyne Indus, Inc.*, 933 F.2d 449, 456 (1991), quoting *LaSalle Nat'l Bank v. Service Merchandise Co.*, 827 F.2d 74, 78 (7th Cir. 1987). If the plain language of the writing is unclear, then parol or other extrinsic evidence must be considered in order to reconstruct the intent of the parties at the time they entered into the agreement. * * *

Another pre-*Rufo* Seventh Circuit decision which lent additional weight to the contractual interpretation theory was *The Money Store, Inc. v. Harris Corp. Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989) The issue was whether a judgment entered after a full hearing in a trademark dispute could be modified. Affirming the trial court's refusal to modify the decree, the court held there were two fundamental principles in Rule 60(b)(5) cases: (1) the showing of "extraordinary circumstances" and (2) disallowance of any relitigation of issues which were resolved by the judgment.

Another pre-*Rufo* trend was a Supreme Court hostility toward modification of consent decrees in general, signaled by three opinions: *Fire Fighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984); *Local 93 International Association of Fire Fighters v. Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d (1986) and *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) The majority opinion in *Stotts*, au-

thored by Justice White, endorsed a "four corners" interpretation of the decree and not what "might have been written had the Plaintiff established his factual claims and legal theories in litigation." (104 S.Ct. at 2586) By contrast, Justice Blackmun's dissent in *Stotts* criticized the majority for its strict construction of the consent decree. (467 U.S. at 609) His position was that the trial court was uniquely capable of determining the parties intent and the purposes that shaped the decree. (467 U.S. at 609) In *Local 93*, the court also favored an interpretation of consent decrees which acknowledged that the decrees have a contractual aspect, in that they are often arrived at through extensive negotiations between the parties. (478 U.S. at 519, 521-22) The majority maintained that it was the agreement of the parties, rather than the underlying law, that creates the obligations contained in the decree. (478 U.S. at 522) Once again there was a contrasting dissent in which Justice Rehnquist insisted that the scope of a consent decree is not determined from the obligations of the parties but rather the "federal statute pursuant to which the decree is entered." (478 U.S. at 536-38) Then in 1991, Justice Rehnquist authored the majority opinion in *Dowell* which did not abandon the "four corners" rule but at the same time expressed the willingness of the court to look beyond the terms of the decree itself to the purpose of the decree. (111 S.Ct. at 636-637) Although *Dowell* may be interpreted as adhering to the strict construction standard for interpreting consent decrees, *Dowell* seems to add incrementally to the confusion. The lower federal courts seem to feel free to pick and choose the particular guideposts for interpretation which seem most appealing under the circumstances. One court may select the "four corners" rule; another may pick the "underlying purpose" approach.

Evans III is a lesson in why Justice Blackmun's thesis in *Stotts* that the trial court is uniquely capable of deter-

mining the parties intent and the purposes that shaped the consent decree, probably will not work well or at all. In *Evans III*, the trial court had initially decided to vacate the consent decree on the basis that the decree had been motivated solely by the result in *Evans I*. Thereafter Plaintiffs filed a motion to reconsider on the basis that the Trial Court in so ruling had really decided a question of fact without a hearing. The court agreed with this argument and thereafter an evidentiary hearing was held. In that hearing CHICAGO asserted an attorney-client privilege as to certain matters and the court heard testimony ". . . about what was in the minds of the Mayor and his aides, who are now deceased. (App. 62) As a result of the hearing, the trial court ruled that motivation in entering into the consent decree was irrelevant. Certainly this procedure illustrates that trying to retrace the path of litigation and excavate what motives prompted the bargaining of the parties six years or more before is an inherently difficult, even speculative process. The concept that a trial court can decide what the parties really meant to do in terms of the underlying purpose of the decree, when the parties really said nothing beyond what is recited in the decree, illustrates why the parol evidence rule in contract law still enjoys vitality. It is ". . . no simple matter for a court to surmise what contracting parties would have done had they foreseen a situation." Comment, *The Supreme Court, 1991 Term; Leading Cases*, 106 HARV.L.REV. 163, 295 n. 43 (1992).

After *Rufo*, at least three decisions have reaffirmed the contractual aspect of consent decrees. *Collins v. Thompson*, 8 F.3d 657 (9th Cir. 1993) and *Kindred v. Duckworth*, 9 F.3d 638 (7th Cir. 1993) involving two justices who were among the plurality in *Evans III*, which states:

> The district court's entry is subject to several interpretations. One reading suggests a belief that con-

> sent decrees, at least those stemming from constitutional grievances, cannot impose upon the parties rights and obligations greater than those required by the Constitution. This view quite simply is incorrect. Consent decrees often embody outcomes that reach beyond basic constitutional protections. *See Rufo*, 112 S.Ct. at 762 * * *; *see also Langton v. Johnston*, 928 F.2d 1206, 1217-18 (1st Cir. 1991). Indeed, it is a rare case when a consent decree establishes only the bare minimum required by the Constitution. Often, it is precisely because parties are unsure of the current posture of the law that they are willing to compromise their positions. (9 F.3d at 641)

And *Crumpton v. Bridgeport Education Association*, 993 F.2d 1023 (2d Cir. 1993) holds that the consent decree is to be interpreted within its four corners and not by what "might have been written had the plaintiff established his factual claims and legal theories in litigation", citing *United States v. Armour & Co.*, 402 U.S. 673, 681-682, 91 S.Ct. 1752, 1757-1758, 29 L.Ed.2d 256 (1971).

Surely the *Evans* consent decree settled more than was required by the federal constitutional floor, in that state law claims were also settled, for purposes of the injunction. If the decree is allowed to be swept away in its entirety, then the *Evans* plaintiffs gave up valuable state law rights and got nothing in return of any durable value. In truth, federal consent decree settlements after *Evans III* cannot be attractive to plaintiffs who thereby encounter the danger of losing those very rights which were thought to have been acquired by the settlement. As the *Evans III* dissent states: (App. 19)

> * * * If courts refused to enforce contractual agreements, "people would be reluctant to enter into contracts and the process of economic exchange would be retarded."

The plurality in *Evans III* does not consider that governmental entities can be bound to their consent decree

contracts. Consistent with this view, the plurality chose to view the consent decree only as a judgment and not as a contract to which the "four-corners" rule of interpretation might be applied. Surely the judgment-versus-contract dichotomy must be the least helpful method of analysis in deciding whether a consent decree should be modified. Relative to this artificial analysis it is said that it is ". . . the enforcement mechanism that makes the consent decree a judicial act." *Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993). In the *Evans* litigation CHICAGO makes no allegation that the trial court was ever asked to consider a problem relating to enforcement of the decree. In fact, there was none. The reporting requirements in the decree ended in 1987. (App. 106) This decree was self-executing and needed no enforcement. All CHICAGO had to do was to follow the formulas spelled out in the decree for appropriating sufficient funds annually to pay tort judgments and for processing the judgments for payment.

Evans III is significant as an example that some of the lower federal courts could feel free to interpret *Rufo* as a tectonic shift in emphasis allowing great freedom in modifying consent decrees. And yet, other post-*Rufo* decisions still appear to adhere to the stricter contractual interpretation standard. Any honest assessment should acknowledge considerable confusion in the lower federal courts with respect to the *Rufo* standards.

III.

THE *EVANS III* PLURALITY OPINION DOES NOT REQUIRE PROOF OF EXTREME AND UNEXPECTED HARDSHIP RESULTING FROM FUTURE ADHERENCE TO THE CONSENT DECREE.

The plurality opinion in *Evans III* dispenses with any necessity for a litigant seeking modification of a consent

decree to prove that unexpected hardship will result from future continuation of the decree. *Rufo* states that modification of an "institutional reform" type consent decree ". . . may be warranted when changed conditions make compliance with the decree substantially more onerous. . . ." (112 S.Ct. at 760) CHICAGO did not even allege hardship as a ground for relief.

Some decisions before and after *Rufo* expressly require a showing of unanticipated hardship. *Gore & Associates, Inc. v. C.R. Hard, Inc.*, 977 F.2d 558 (D.C. Cir. 1992), for example, involved a plaintiff patent infringer seeking to modify an injunction entered by consent as part of a settlement agreement. The court, reciting (at 977 F.2d 560-561) what it believes are the applicable rules, appears to lean in favor of a rather strict four-corners interpretation as follows:

> For a judgment entered on consent, the asserted reasons for the requested modification must be evaluated in the context of the negotiated bargain between the parties at the time of the settlement, this bargain adding weight to the policies of res judicata. In *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 88 S.Ct. 1496, 20 L.Ed.2d 562 (1968) the Court explained that although a decree may be changed in appropriate circumstances, "it may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *Id.* at 248, 88 S.Ct. at 1499. That a contract voluntarily made turns out to be less or more favorable to one of the parties is insufficient ground for judicial intervention.

The court in *Gore* was faced with a request for modification solely premised upon a conceded change in the applicable law, the applicant's contention being that no showing of hardship was necessary. Finding "no support in precedent for that abstract proposition, which would lead

to pernicious instability of final judgments" (977 F.2d at 563) the court refused modification. A similar result occurred in *United States v. City of Chicago*, 978 F.2d 325 (7th Cir. 1992) ordered a consent decree in an employment discrimination case modified where hardship unforeseen at the time of the original decree made it inequitable to continue it without modification. And the Seventh Circuit also held in *The Money Store, Inc. v. Harris Corp. Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989) that proof of hardship was required.

Another recent decision in a school desegregation case tracks *Rufo*'s "substantially more onerous" language. *Lorain NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1993). Another verbal formula is simply to follow the basic language of Rule 60(b)(5) and hold that any change in circumstances sufficient to ". . . render the continuance of the injunction in its original form inequitable" will allow vacation of a consent decree. *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3rd Cir. 1993). This is a loose standard which practically invites defendants to the banquet table of additional litigation. A strict construction of the majority opinion in *Rufo* would indicate that where a "clarification in the law" completely obliterates the jurisprudential underpinnings of any specific part of a consent decree, the party requesting modification must nonetheless plead and prove, in addition, that the change in law makes it "substantially more onerous" for that party to comply with the decree. Although this seems clear from *Rufo*, the lower federal courts do not seem to have perceived such clarity, and as a result the 'hardship' standards for decree vacation since *Rufo* display wanderlust rulings not closely tied to *Rufo* standards.

IV.

THE *EVANS III* PLURALITY EFFECTIVELY ELIMINATES STATE LAW CLAIMS PENDENT JURISDICTION FROM THE PROTECTION OF FEDERAL CONSENT DECREES.

Rufo does not directly address how to deal with state law claims settled in a consent decree which the settling defendant later seeks to vacate on the basis of a change in federal law. The guidance in *Rufo* on this point is that the decree does not have to be interpreted by reference to the federal constitutional floor. The plurality in *Evans III* rules precisely counter to this rule. The plurality holds that a federal consent decree must rest upon a "substantial federal claim", both at the time the decree is entered and at such later time as the decree is being analyzed for purposes of vacation. The plurality thus accords the plaintiffs' state law claims no significance whatsoever. Plaintiff *Evans* claims that the giveup of plaintiffs' state law claims was a major negotiated waiver constituting legal consideration for the contractual bargain. These claims, once they were settled in the decree by agreement, could no longer be asserted in the future by plaintiffs as the basis for injunctive relief. The consent decree in this respect had the same preclusive effect as would result from any other type of judgment.

State law judgments have preclusive effect on a federal claim which was presented to the state court or which could have been presented, provided that the state court had jurisdiction and afforded a full and fair opportunity to litigate the federal claims. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Vandenplas v. City of Muskego*, 753 F.2d 555 (1985), *cert. den.*, 472 U.S. 1018, 105 S.Ct. 3481, 87 L.Ed.2d 616 (1985); *Button v. Harden*, 814 F.2d 382 (7th Cir. 1987).

The reverse is also true, namely, that a state law claim incorporated in a federal court judgment cannot later be relitigated between the same parties. A recent decision by the 10th Circuit dealt with language in a consent decree similar in its breadth to the language in the *Evans* consent decree. In *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) a mineowner and the State of Colorado entered into a consent decree which stated that it settled "all claims between the parties which have been raised in State's complaint." Private landowners in Colorado brought suit against the mineowner to recover for property damage and economic losses allegedly caused by hazardous waste products of mining. The court held that the decree was a final judgment on the merits of state law claims for purposes of res judicata. The *Satsky* holding means that broad settlement language in a federal consent decree is a bar to any state law claims which were brought or could have been brought, and only federal claims are subject to modification or vacation.

Illinois follows a claim preclusion rule essentially identical to the federal rule. The Illinois rule holds that any matter which could have been litigated by the same parties in a prior federal court proceeding is a complete bar to raising such a claim in a later Illinois proceeding. *Housing Authority for LaSalle County v. Young Men's Christian Association of Ottawa*, 101 Ill.2d 246, 461 N.E.2d 959, 78 Ill.Dec. 125 (1984); *Gregory v. County of LaSalle*, 40 Ill.2d 417, 240 N.E.2d 609 (1968); *United Mfg. Co. v. Mitchell Novelty Co.*, 350 Ill.App. 321, 113 N.E.2d 78 (1st Dist. 1953) (Abstract Opinion); *In Re Estate of Luer*, 348 Ill.App. 324, 108 N.E.2d 792 (4th Dist. 1952).

The bottom line of these rules is that when an action involving both state law claims and federal civil rights act claims winds up in federal court, either through an original filing there or by a defendant's removal from an original filing in state court, a federal consent decree will

probably settle all claims. Theoretically, separation of the state/federal claims can occur. Remand of the state claims to state court is possible either by an order by the federal trial court dismissing the state law claims without prejudice or declining to exercise further pendent jurisdiction over them. Realistically it will not happen. It is not to the advantage of a defendant to agree to settle only federal claims and permit the state law claims to drag on in state court. And it is likely that any comprehensive settlement in federal court will effectively embrace and remedy the perceived wrongs under state law.

For a case such as *Evans*, the implications of the claim preclusion rule are enormous. *Evans* asserted state law claims under Illinois statutes and the Illinois Constitution. As part of the settlement, these claims, and any other claims which might have been asserted, were compromised and disappeared, in terms of the injunctive relief sought. The *Evans III* dissent states: (App. 19)

> * * * The Consent Decree later indicates that it is a "final and total settlement of all claims [that the plaintiffs] now have or may have in the future, arising either directly or indirectly out of [the Illinois Code], as well as under the United States and Illinois Constitutions, except for claims for damages and attorneys fees."

Focusing on this language, the dissent states: "The plurality's assertion that Chicago in 1984 did not settle *any* aspect of the merits of the dispute is simply and transparently wrong." (App. 18) Claim preclusion is an integral aspect of this analysis. The *Evans* plaintiffs are now in the position of having bargained away their state law claims. They absolutely cannot apply now to an Illinois state court to regain them based upon a federal court judgment which has been vacated and set aside. Claim preclusion rules prevent it. The point of view of the *Evans III* plurality is that no part of the settlement was "on the merits."

This is irrelevant if the settlement bars relitigation of non-federal claims. In sum, the view adopted by the plurality does not accommodate any principles of state law claim preclusion to federal consent decrees and does not recognize that the giveup of state claims was part of the legal consideration for the contractual aspect of the decree.

V.

THE SEVENTH CIRCUIT PLURALITY DECISION DOES NOT REQUIRE THE PARTY REQUESTING MODIFICATION TO TAILOR A PROPOSED MODIFICATION TO THE CHANGE IN THE LAW RESULTING FROM *EVANS II*.

Rufo states (112 S.Ct. 763):

> Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the District Court should determine whether the proposed modification is suitably tailored to the changed circumstances. * * *

Just as CHICAGO did not allege any hardship resulting from the decision in *Evans II*, CHICAGO did not offer any proposed modification in the nature of a tailoring of the existing Consent Decree to the change in the law. CHICAGO simply insisted that the change in the law destroyed the entire foundation of the Consent Decree, and the Decree should be vacated in its entirety. *Rufo* further makes clear that in evaluating the proposed modification to see that it is suitably tailored the district court must consider three factors: 1) the proposed modification must not create or perpetuate a constitutional violation; 2) the proposed modification should not strive to rewrite a Consent Decree so that it conforms to the constitutional floor; and 3) given the foregoing constraints, the District Court should defer to local government administrators, including matters relating to the financial impact of the proposed change. (112 S.Ct. at 763-764)

The District Court in this instance did employ a tailoring approach. The court said that the legal underpinning of the consent decree had not been eliminated in its entirety. The trial court observed that *Evans II* did not hold that certain practices of CHICAGO did not constitute denials of due process. Rather, the due process issues left open by *Evans I* were settled in the consent decree (App. 60) The court further said that the due process issues were not, in the language of Rule 60(b)(5), reversed, vacated or overruled and thus the Rule as applied to those other issues did not apply and CHICAGO did not qualify for relief thereunder. (App. 60) On the subject of equitable considerations, the trial court made two points. First, the court said: (App. 64-65)

> "* * * It would be inequitable for this Court to say to the Plaintiffs that having given up their right to litigate the due process issue and having had that surrender confirmed by the express holding to that in *Evans II*, that they must forfeit the benefit of that bargain. That would be inequitable, and that is why the second part of Rule 60(b)(5) provides no comfort whatever for the CITY. There is no basis upon which this court could hold that it is no longer equitable that the judgment should have prospective application."

Secondly, the trial court stated that language used in the *Evans II* opinion such as, "The reasons presented by the City for the practice are by no means compelling." are not a description of a position which cries out for equitable intervention. (App. 65)

Plaintiff Evans submits that any tailoring approach should take into account the presence of the unresolved state law claims in *Evans*. Tailoring must also be geared to the 1986 change in the applicable state statute. Most of all, *Rufo* would seem to require an inquiry into what tort judgment payment procedures CHICAGO proposes to follow in the event the decree is vacated, with particular reference to the mandates of state law. The plurality opinion in

Evans III eliminates any of the forgoing considerations as relevant to a consent decree modification inquiry. What appears to be a required evaluation by *Rufo* is totally dispensed with in the plurality opinion.

VI.

EVANS III VIOLATES THE RULE ANNOUNCED IN *RUFO* THAT A CONSENT DECREE SHOULD NOT BE MODIFIED OR VACATED TO CONFORM TO THE FEDERAL CONSTITUTIONAL FLOOR.

Rufo expressly acknowledges the principle that a consent decree can incorporate an undertaking to do more than is strictly required by the federal constitutional law. *Rufo* states: (112 S.Ct. at 762-764)

> (1) "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation. * * *" (112 S.Ct. at 763)
>
> (2) "But we have no doubt that, to "save themselves the time, expense and inevitable risk of litigation", *United States v. Armour & Co.*, 402 U.S. 678, 681, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971), petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than a court would have ordered absent the settlement. * * *" (112 S.Ct. at 762-763)
>
> (3) "A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor. Once a court has determined that changed circumstances warrant a modification in a consent decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court

> should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires. * * * (112 S.Ct. at 764)

Evans III went beyond the constitutional floor when the plurality undertook to justify vacating the consent decree by ruling upon a substantive due process issue which the plaintiffs were barred from raising in the *Evans III* appeal. It should be noted that the *Evans III* plurality does not reach certain issues which were in controversy at the time the consent decree was negotiated. The plurality does not reach any of the state law issues, nor is there a discussion of whether Section 9-104(a) of the Illinois statute was facially unconstitutional or whether the practices of CHICAGO, as distinct from the practices required in the statute, violated procedural due process. The District Court, it will be recalled, had indicated that CHICAGO simply did not follow any 'process' at all.

Certainly at the time the consent decree was entered constitutional claims were presented other than the equal protection claim which, at minimal value were 'colorable' and, viewed more expansively, were persuasive. The dissent in *Evans III* saw these claims as "at least colorable" (App. 21, 22) Justice Flaum, in particular, stated: (App. 22)

> In my opinion a colorable due process theory supported at least part of this decree when it was entered in 1984, and nothing in *Evans II* or in any other case since alters that conclusion. The district court, intimately familiar with the decree and its foundations, understood the precise import of *Evans II* and acted well within its discretion in modifying the decree accordingly. I also see no inequity at this time in continued enforcement of the decree. Chicago does not complain that compliance has now become onerous and, indeed, even indicates its intention, with or without the decree, to continue to pay tort judgments promptly.

The majority in *Evans I* in a *dictum* commented favorably on the due process issues, (App. 126-127) and Judge Thomas in a concurring opinion felt they were squarely in issue in the appeal. (App. 132) The district judge had looked favorably on these claims. (App. 114)

If before *Evans III* there had been just one clear decision which indicated that the federal procedural and substantive due process claims as asserted in *Evans* were unsupportable, then surely the plurality in *Evans III* could be said to have followed the narrow prescription of Rule 60. The fact is, there is no such decision. Nonetheless the plurality chose to embark on a doctrinal safari not tied to any known precedent.

VII.

EVANS III EMPLOYS AN IMPROPER DE NOVO STANDARD OF REVIEW IN WHICH QUESTIONS OF FACT ARE DECIDED BY THE REVIEWING COURT.

The plurality opinion in *Evans III* gives lip service to the required standard of review, which it agrees is abuse of discretion. (App. 17) The plurality then proceeded to impose a broad and liberal "lookback" standard to modification of a Consent Decree. The lookback, done at the time a later modification is sought by a party to the original Decree, requires an evaluation of the motives of CHICAGO in entering into the consent decree. The plurality states: "This consent decree is 'based' on *Evans I* rather than an independent compromise of the due process claim."; the CITY "knuckled under" to the consent decree because *Evans I* implied it must do so. (App. 5) This is an idiosyncratic viewpoint which deliberately gives little weight to the intention of the parties gleaned from the language of the consent decree itself. Instead, the majority itself decided in this case what CHICAGO must have been thinking. The plurality's conclusion rejects the Trial Court's

own express finding after the evidentiary hearing on motivation: (App. 60)

> Is the consent decree based on a judgment which has been reversed or otherwise vacated? The answer is yes, in part. The equal protection holding of Evans I was the law of the case as of the entry of the consent decree and, I think, clearly entered into those considerations which resulted in the consent decree. * * * Nothing else is based upon a judgment that has been reversed or otherwise vacated or overruled.

On the one hand, the plurality's approach seems a creative departure which wanders far from the standard of abuse of discretion contemplated by *Rufo*. On the other hand, *Rufo* states that a change in the law may provide a basis for modifying a decree ". . . if the parties had based their agreement on a misunderstanding of the governing law." (112 S.Ct. at 763) The latter dictum seems to invite a trial court to perform a legal autopsy on the mentation of the parties long after the decree has been laid to rest. Notwithstanding this, the plurality's conclusion of what motivated CHICAGO to settle, is exactly the opposite of the express finding by the trial court after an evidentiary hearing, that motivation of the parties was irrelevant. This was the literal contention advanced by CHICAGO. Even more astonishing, this finding of fact by the plurality which ignored the plain language of the decree appears to contradict what was decided in the Seventh Circuit three weeks previously in *Kindred v. Duckworth*, 9 F.3d 638, 642 (7th Cir. 1993)

> * * * . . . the text of the decree provides no support for the proposition that its terms are tied to minimal constitutional safeguards. If the parties had intended to draft such a document, one would expect either express language to that effect or, at least, terms which encompass the barest of then-extant constitutional rights. Neither circumstance exists here. * * *

It is plain from the decree what claims motivated CHICAGO. There were three groups of claims: (1) the equal protection claim decided in *Evans I*, (2) the federal due process claims, both procedural and substantive, arising from the practices of CHICAGO and (3) the state law claims. The trial court observed that the federal due process claims, measured against the language of Rule 60(b)(5) had not been vacated or overruled in *Evans II*. The trial court agreed with the claim by CHICAGO that its motivation, confronted with these various claims, was irrelevant. Thus this litigation is unusual in that CHICAGO could not prove that it based its consent to the settlement on a misunderstanding of the applicable law for two reasons. First, there were a variety of claims upon which the settlement could have rested with no adequate proof that CHICAGO's motivation rested exclusively or even primarily upon the equal protection claim already decided in *Evans I*. Secondly, CHICAGO insisted that its motivation was irrelevant. This insistence may have stemmed from CHICAGO's own assessment of its chances of persuading the trial court in the evidentiary hearing that the loss of the equal protection claim in *Evans I* was its only motive or the predominate motive for settling. Whatever the reason, CHICAGO should remain tied to its trial court position. Obviously the *Evans III* plurality did not feel so constrained. Plaintiff *Evans* submits that the plurality decision is an unambiguous example of a reviewing court deciding a question of fact contrary to the decision in the trial court, contrary to the position of a party and contrary to the required standard of review. The violation of the standard of review was underlined in the dissent: (App. 21)

> Finally, I am astonished by the plurality's suggestion that we have announced a "rule of law" for the future guidance of district courts. Pl. Op. at 17. Here, of course, we are violating the basic principle of strong deference to the district court in the construction of

its own consent decrees. It does not seem to me that we are announcing a rule of law. It is more like a rule of anarchy. The solemn promises of governments bind only for the day. * * *

CONCLUSION

Unless the consent decree modification standard is inextricably tied to a post-decree decision which has reversed or vacated each salient point of law upon which the previously entered decree rests, the federal courts can expect to be besieged with decree modification requests. Lawyers worry about their patrons' criticism for failing to do something that has any slight chance of succeeding. And governmental entity litigants holding the reins of decision sometimes have little to lose but the time and expense of taking a chance at a lucky outcome.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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ADDENDUM

Relevant Statutes and Rules

1. Section 1983 of the Federal Civil Rights Act, 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Rule 60 of the Federal Rules of Civil Procedure provides:

> Relief from Judgment or Order.
>
> (a) Clerical Mistakes. * * *
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: * * *
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * *